87-610

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Petitioner,
v.
VERMONT CASTINGS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. This is a suit for damages resulting from horizontal and vertical price restraints among directly competing retailers one of whom was the manufacturer of the product involved. Evidencing a strong antipathy toward *Dr. Miles Medical Co. v. John D. Park & Sons Co.* and disparaging this action because of the market of the manufacturer, the court of appeals appears to have ruled on the facts contrary to the settled decisions of this Court. The question is whether the court should clearly reaffirm *Dr. Miles* in its full breadth.

2. Whether practices of retailers of a product regarded as the premiere of its kind in the country and of the manufacturer-retailer by mail of the product, which was in direct competition with the other retailers, entailing announcements to the other retailers of the manufacturer's current retail prices and recommended price schedules for the other retailers, discretionary use by the manufacturer of practices benefiting some individual retailers and injuring others, dealership contracts terminable on short notice, nearly uniform adherence throughout the country to the price schedules, demands to the manufacturer by other retailers for action against a retailer who does not comply with the schedules and threatened and injurious actions by the manufacturer against the non-complier show a conspiracy or combination in violation of the Sherman Act.

3. The evidence produced by the petitioner shows that during a period of three years of harassment of the petitioner by the respondent, the petitioner's income dropped $102,000.00 or an average of $34,000.00 a year in relation to a yearly average of his prior income. Evidence presented by respondent shows that the market in general for the product involved declined at about 10% per year. The jury awarded $70,000.00 for the three years and $30,000.00 for

the future. The court of appeals held that the award was excessive. The question is what, if any, additional proof should have been presented in order to sustain the award of the jury and whether, if the damage award is deemed excessive, the court of appeals should have specified the excessiveness and given the petitioner the option of receiving the award minus the court determined excess.

4. The respondent's motions after verdict asked for judgment n.o.v. or in the alternative for a new trial on several grounds, one of which pertained to a claimed excessiveness of the jury award. The trial court granted the judgment n.o.v. and held that the award was excessive. It did not rule on any other ground for the motion for a new trial. The respondent did not press the district court for a ruling on the other grounds and raised no question with respect to any error of the district court in this regard in its brief in the court of appeals. The question is whether the petitioner had been deprived of procedural due process by the court of appeals' *sua sponte* ruling that the grounds may be pressed upon remand.

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The petitioner, Greggar S. Isaksen, d/b/a Applewood Stove Works, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on August 4, 1987.

OPINION BELOW

The opinion of the court of appeals is reported at 825 F.2d 1158 and appears in the Appendix hereto. The opinion of the district court granting respondent's motion for judgment n.o.v. which has not been reported, also appears in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1987. It reversed the judgment n.o.v. and remanded the case with directions. No rehearing was

sought. This Petition for Writ of Certiorari was filed within ninety days after entry of the judgment in the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. §15(a) provides in part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This action was brought by the petitioner (Isaksen) in the United States District Court for the Western District of Wisconsin to secure damages from the respondent (Vermont Castings) caused by concerted retail price setting in violation of section 1 of the Sherman Act, pursuant to 15 U.S.C. §15 and 28 U.S.C. §1337. The case was tried before a jury which answered "yes" to the question of whether Vermont Castings contracted, combined or conspired with any of its dealers to set the retail price of stoves manufac-

tured and sold by it. The jury found that, in furtherance of the conspiracy, Vermont Castings injured Isaksen's business or property and that, as a result, Isaksen suffered past damages of $70,000.00 and future damages of $30,000.00. The district court initially entered judgment for Isaksen, tripling the award. Subsequently, it granted judgment n.o.v. for Vermont Castings and held that the damage award was excessive.

The court of appeals reversed the judgment n.o.v. because there was evidence of a price setting agreement unwillingly entered into by Isaksen with Vermont Castings; but held that there must be a new trial on damages and, in the discretion of the district court, on liability. The court also held that the evidence did not show a concert of action between Vermont Castings and other retailers, App. p. 4a, thus preventing recovery of damages for any injury caused by the respondent which is not pertinent to the unwilling agreement.

Isaksen, operating as Applewood Stove Works, has been a retailer of wood burning stoves since 1975. He became a retailer of Vermont Castings stoves on February 1, 1982, and has been an authorized Vermont Castings dealer since that date. Tr. 1A pp. 69-70, 79. His written contract provided that it could be terminated on 30 days notice and that it expired on December 31, 1983. Ex. 1c. In a concurrent letter Vermont Castings reserved the right to sell "direct" and appoint dealers anywhere it deemed appropriate. Ex. 1d. Since before 1982, the Wisconsin Fair Dealership Law, ch. 135, Wis. Stats., has prohibited cancellation or non-renewal or a substantial change in competitive circumstances of a dealership agreement without "good cause."

Isaksen's home and business are located near Poynette in Columbia County, Wisconsin, about 21-23 miles north of the City of Madison in Dane County. Tr. 1A pp. 69-70, 81. In 1981, ninety percent of Isaksen's stove business was generated in Dane County and on the edges of Dane

County. Tr 1A p. 84. His primary market was greater Madison. *Id.* p. 90. When he became a dealer, it was understood that Isaksen would concentrate his efforts to promote Vermont Castings products in the greater Madison area. Tr. 2A p. 32, Ex. 1e, 1f. Vermont Castings assured Isaksen that it would not mail southern Wisconsin on behalf of Thomas Bowditch, a dealer located in Janesville, Wisconsin, using the name of "The Woodshed", who was to concentrate on the Rockford, Illinois area. *Id.*; Tr. 1A pp. 114-116; Ex. 15g; Bowditch, like many Vermont Castings dealers, had no written dealership contract. Tr. 1A p. 74, 3A p. 29.

Vermont Castings, located at Randolph, Vermont, commenced manufacturing stoves in 1975 and, initially, sold its stoves almost exclusively at retail. Tr. 1A p. 70, 3A pp. 22-23. In 1982, 35% of all of its sales, in terms of dollars, were direct retail sales. Tr. 3A p. 105. In that year, by the use of national advertising, it had generated a mailing list of about 400,000 persons and sold stoves at retail throughout the country by mail order. Tr. 1A pp. 70-72. Vermont Castings stoves are regarded as the premiere stoves in the country and have 30% of the market in the Northeast and 10% in the Midwest. Tr. 3A pp. 22, 109, 110.

In January 1982, Vermont Castings informed all authorized dealers of two retail price schedules, one for itself at the factory, plus shipping costs, and one recommended for the other dealers who were to take into consideration transportation costs. Ex. 3c. Vermont Castings' retail prices were about $70.00 less than those recommended for other retailers. *Id.*

Stephen Morris, the Vermont Castings retail sales manager, acknowledged that other retailers "always" complained about the company's retail prices. Tr. 3A pp. 24, 91. The company established a Council of Dealers in March 1983 which constantly discussed the margins between dealers' costs and dealers' prices during its semiannual meetings. Tr. 1A p. 71, 3A p. 106. In November

1982, the dealers were advised that Vermont Castings' retail prices were going up about $45.00 per model, that there would be no change in the prices it charged dealers and that the change "maximizes your sales potential." Ex. 3i. In May 1983, Vermont Castings advised the other dealers that its retail prices would increase by an average of 16%, that its prices to other dealers would increase by 8% and the retail prices it suggested for other dealers would increase by 8%. Ex. 3o, App. p. 30a. The other retailers were furnished a pricing comparison showing a flat $30.00 differential between Vermont Castings' retail prices and the suggested retail prices that all other retailers charge for all models, subject to regional variations because of freight rates. Ex. 3p. Later, Vermont Castings informed the other dealers that "[t]o lessen the impact of competitive shopping, our factory direct price will be increased by $30.00 per stove on January 1, 1984 to achieve complete parity between our direct prices and our recommended retails." Ex. 3v. As a result of that increase Vermont Castings' total receipts from retail sales went down. Tr. 3A p. 92.

Except for Isaksen no dealer in Wisconsin or Illinois, as a regular matter, charged less than the Vermont Castings recommended prices. Tr. 2A pp. 55-56. In 1986, in addition to Isaksen, only 10 to 12 dealers out of 230 in the United States were as a regular matter selling below the Vermont Castings recommended prices. Tr. 1A p. 70, 3B p. 13. None was in the Midwest. *Id.*

Vermont Castings informed Isaksen when he became a dealer, and all other dealers, that failure of dealers to follow the recommended pricing will in no way affect their relationship with Vermont Castings. Exs. 1d, 3p. The court of appeals found, however, that there was evidence showing that Isaksen was coerced by Vermont Castings to charge its recommended retail prices. App. pp. 5a-6a. He did so for a four-month period at the end of 1983. Tr. 1A pp. 133-134, 139-140. September to December is the on-season for stove sales. Tr. 1A p. 92.

When Isaksen began to sell Vermont Castings stoves in February 1982, his prices were identical to the Vermont Castings retail prices. Tr. 1A p. 100. Shortly thereafter, Michael Eder, a Milwaukee, Wisconsin dealer in Vermont Castings stoves, who had no written dealership contract, Tr. 1A p. 74, 2A p. 41, told Isaksen that he should be adding a transportation charge to his stove prices, just like Vermont Castings does. Tr. 2A pp. 50-51, Ex. 1096. When Isaksen refused, Eder complained to Vermont Castings. Tr. 2A p. 51. In March 1982, Morris told Isaksen that Isaksen's method of pricing was "oddball". Tr. 1A pp. 102-103. Morris, responding to the complaints by Eder and Bowditch, told them that he would make sure that Isaksen understood Vermont Castings' factory pricing. Tr. 3A pp. 38-39, 112-113. Morris visited Isaksen in his home in May or June 1982. Tr. 1A p. 129. According to Isaksen, Morris told Isaksen that he was concerned about the effect Isaksen's prices were having on factory direct sales and that Vermont Castings needed the factory direct sales. Tr. 1A p. 129. According to Morris, he wanted to make sure that "he understood our direct pricing." Tr. 3A p. 35. In September 1982, Morris told Isaksen that if he did not get his prices in order he would get his orders mixed up. Tr. 1A p. 130.

On October 17, 1982, Bowditch asked for "an answer or a solution to the problem" of Isaksen's prices. Ex. 15d. Bowditch and other Wisconsin dealers agreed among themselves that they would complain about Isaksen's prices. Tr. 2A pp. 92-93, 103. During two weeks in September 1984, a Vermont Castings sales representative participating in midwest regional meetings with dealers, transmitted complaints about Isaksen's prices daily to Morris. Tr. 2B pp. 70-72. Over 100 complaints were received. Tr. 3A pp. 94-95.

In January 1983, Isaksen was excluded from a mailed promotion in that part of Dane County outside of Madison and Bowditch was promoted instead. Tr. 1A pp. 123-127. Isaksen declined to participate in the promotion in other

areas. *Id.* Morris testified that Isaksen's exclusion from the Dane County mailing was made in response to a request from other dealers. Tr. 3A pp. 113-114. Isaksen testified that Morris told him that the reason for the change was that other Wisconsin dealers were complaining about his prices. Tr. 1A p. 125.

A July 1983 Vermont Castings promotional mailing listing Vermont Castings dealers in Wisconsin and other states omitted Isaksen's name. Tr. 1A pp. 132-133. Becoming worried, Isaksen raised his prices to the full recommended price starting in September 1983. Tr. 1A pp. 133-134. On September 19, 1983, Vermont Castings restricted referrals to Isaksen to telephone referrals only and, even though Isaksen had given the company an in-state "800" number, restricted telephone referrals to those cases where the customer makes inquiry about a dealer in the "immediate area around Poynette." Tr. 3A pp. 54-57; Exs. 2a and 2b; App. pp. 32a-33a. On Sunday, September 25, 1983, Vermont Castings published a two sided advertising supplement in the Wisconsin State Journal and Milwaukee Journal inviting inquiries by mailed coupon or a telephone call for the nearest dealer. Tr. 1A pp. 134-135, Exs. 6a and 6b. Approximately 60% of all households in Dane County receive the Sunday edition of the Wisconsin State Journal. Tr. 2B p. 5. No referral was made to Isaksen in response to that advertisement. Tr. 1A p. 138, 3A p. 116. For the next six months Vermont Castings sent to inquirers a list of Wisconsin dealers which omitted the name of Isaksen's business. The list followed a printed statement reading "[b]elow are the Vermont Castings Authorized Dealers in your region." Tr. 3A p. 117-118, Ex. 28; App. p. 35a. Vermont Castings almost entirely excluded Isaksen from its "close the loop" referral program, started in September 1983, furnishing to Bowditch from 1983 on the names of over 400 inquirers from the Madison and surrounding area, including Poynette. Tr. 1A p. 73; Tr. 2A pp. 97-98, 2B pp. 69-70, Ex. 3q. Isaksen received only 26 referrals and that

happened largely in July or August 1984. *Id.* Tr. 1B p. 44. In a February 1984 letter, Bowditch thanked Morris for his efforts. Ex. 15e.

Isaksen, through his lawyer, protested to the president of Vermont Castings in October 1983. Tr. 3A p. 57. Within a month thereafter Vermont Castings began looking for a new dealer for Madison. Tr. 3B p. 12. Starting in February 1984, Vermont Castings secured Bowditch's begrudging agreement to give up his sales efforts in the Rockford, Illinois area and open a Madison store selling Vermont Castings stoves. Tr. 2A pp. 88-89, 100-101; Ex. 15e. Bowditch's Madison store was opened on September 15, 1984 with a promotional mailing by Vermont Castings which included the Poynette area. Tr. 1B pp. 14-15, 44, Ex. 24k. In a May 16, 1985 letter, Bowditch wrote Morris protesting an Isaksen "price war" advertisement, stating: "[w]e were cajoled into believing that V.C. would take care of Greg & that they needed us to market the Madison area." Ex. 15g; App. 38a. Bowditch testified that none of the statements in the letter was untrue when they were made. Tr. 2A pp. 102-103. On July 12, 1985, Mitch Sobota, a Vermont Castings representative, reported to the company that Bowditch "needs to be motivated and reminded that V.C. has put him where he is today." Ex. 15h.

In January 1984, Isaksen reverted to his former practice of matching Vermont Castings' retail prices. Tr. 1B p. 42. After Bowditch was brought to Madison in September 1984, Isaksen lowered his price to cost plus 6% and liquidated his inventory. Tr. 1B p. 56.

Eder, the Milwaukee dealer, asked that Vermont Castings do anything that it could "legally" do with respect to Isaksen because he knew that in Wisconsin the law made it difficult to terminate a dealer. Tr. 2A pp. 49, 53. Morris had told Eder that there are laws in Wisconsin which are difficult to handle. Tr. 2A p. 75. As a temporary member, Eder addressed the Dealer Council with respect to Isaksen's prices after agreeing to Morris' request "to be very

careful of what you say because of legalities." Tr. 2A pp. 54-55, 75-76. On April 6, 1985, Eder wrote Morris asking that he be "kept aware of things—if legally possible" concerning Isaksen. Ex. 16c. Morris responded that "[w]e promise to keep you abreast of any developments." Ex. 16c. On June 27, 1985, Sobota reported to the company that Eder wanted to know when the new dealer agreement (which was subsequently submitted to but not signed by Isaksen, Tr. 2A pp. 24-25) would be ready because he felt that this would help put pressure on Isaksen to give up on Vermont Castings. Ex. 16d. One purpose of a July 12, 1985 visit by Sobota to Bowditch was "[h]ow to combat prices by Applewood". Ex. 15h.

In the last few months before trial, Vermont Castings distributed printed lists of dealers, including Isaksen's business, to inquirers but, by a concurrent personal letter, referred each inquirer to a dealer other than Isaksen even though Isaksen was the closest dealer. Tr. 1B p. 24-26, 43; Ex. 27a.

The following excuses were offered to the jury for Vermont Castings' conduct: that there was free riding because Isaksen advertises that purchasers will save money by coming to him, Tr. 3B pp. 56-57; that there was a failure to turn in names of purchasers as his contract requires, Tr. 3B pp. 61-62; that Isaksen said he didn't want to participate in any promotional program, Tr. 3B pp. 63-74; and that Isaksen was not committed to the close the loop referral program. Tr. 3B p. 65.

Evidence pertaining to these points shows that in October 1982 Bowditch complained to Morris that, after educating three prospective purchasers, he lost their sales to Isaksen. Ex. 15d. Isaksen spent $16,500.00 in television and print advertising in 1982 and $18,000.00 in 1983. Tr. 1A pp. 133-134, 1B p. 3. In contrast, Bowditch spent only $4,856.39 for advertising in the Rockford area over the same two year period. Ex. 15e. In a letter sent to Morris 10 days before Isaksen was made a dealer, Isaksen sent to

Morris a list of 25 Wisconsin cities, including Madison, Janesville, Milwaukee and Green Bay in which his 1982 "Yellow Pages campaign will appear". Tr. 1A p. 93; Ex. 1b. Isaksen testified that "the other dealer had a free ride on my TV commercial and all the publicity I had built up for Vermont Castings." Tr. 1B p. 49. With respect to purchasers' names, many dealers did not furnish names, Tr. 3B pp. 5-7; Vermont solicited directly those persons whose names Isaksen did furnish, Tr. 1B pp. 6-14; and Vermont Castings never gave Isaksen any notice under the Wisconsin Fair Dealership Law of any defect in performance. Tr. 1B pp. 59-60, 3A p. 107. Morris' claim that Isaksen requested that he be eliminated from all programs was based on a telephone conversation which occurred prior to a February 3, 1983 letter from Morris to Isaksen wherein he referred only to Isaksen's disinclination to participate in the Winter 1983 promotion. Tr. 3A pp. 47-49, 82-83, Ex. 102l. Isaksen disputed the claim. Tr. 1B p. 89. With respect to the claimed lack of commitment to the close the loop program, the evidence shows that when the program was instituted in 1983 Vermont Castings took advantage of the publicity built up by Isaksen for its products and sent as much business as it could to Bowditch and none to Isaksen. Tr. 1B p. 49. Bowditch did not do any of the record keeping requested by Vermont Castings with respect to follow ups on close the loop referrals. Tr. 2B pp. 65-66. During the period from Christmas 1985 to April 17, 1986, none of the close the loop materials sent to Bowditch by Vermont Castings was opened. Tr. 2A pp. 134-135. On the other hand, Isaksen received numerous compliments from customers, Tr. 1B p. 59, and was very knowledgeable on the technical side of wood stoves, having served on a state government wood safety committee. Tr. 1A p. 78, Tr. 3A p. 26. A Vermont Castings representative wrote Isaksen in March 1982 citing "[t]he aggressive energy that sets you apart from so many mediocre stove dealers. . . ." Ex. 1004.

Vermont Castings has not received any consumer complaint about Isaksen. Tr. 3B p. 13.

Isaksen testified that his business was hurt by his 1983 unwilling adherence to the recommended price structure and by the acts of Vermont Castings in steering business away from him, including its conduct in bringing Bowditch to Madison in September 1984 which Isaksen testified "just ruined everything we had worked for since '75 and completely eliminated all of the profitability of the business." Tr. 1B pp. 46-57. During the five year period ending with the end of 1981, the average earnings from his stove business, including the amount he shared with his wife who was his only help, was $31,078.00. Tr. 4A pp. 22-23, 31-32, Ex. 33. In 1981 it was $22,448.00; in 1982, $34,130.00; in 1983, $5,854.00; in 1984, $10,060.00; in 1985, a net loss of $18,796.00. *Id.* Using the $34,130.00 income for 1982 as a measuring stick, the total decline in his income for 1983, 1984 and 1985 was $105,272.00. Using the $31,078.00 average as a measure the total decline for those years was $96,116.00, without considerating inflation.

Isaksen testified that in his opinion, based on his knowledge of the Madison market, the drop in the income of his business in 1983, 1984 and 1985 was due to Vermont Castings' actions. Tr. 4A pp. 24-29, 60-61. His opinion as to his future earning ability in the stove business because of the injuries was in the range of $10,000.00 to $12,000.00 per year. Tr. 4A p. 28. Upon objection of counsel for Vermont Castings on grounds of irrelevancy, the district court prohibited expert testimony as to Isaksen's ability to make career changes. Tr. 4A pp. 80-82. Expert certified public accountant testimony computed past damages at $102,000.00 and future damages of $210,000.00 based on a 10 year period with a 5% inflation factor and 7% interest factor. Tr. 4A pp. 91-94.

Morris testified that, like the industry generally, Vermont Castings had a drop in sales in the amount of about

10% per year after 1981, Tr. 4A pp. 114-115, but admitted that some dealers have adapted very profitably to the marketplace. Tr. 4A pp. 124, 126. Professor Donald Nichols, chairman of the economics department of the University of Wisconsin, testified on behalf of Vermont Castings that the changed performance of Isaksen's business was largely the same as the general decline of the market. Tr. 4B pp. 23, 27. He agreed, however, that the increase of performance of Isaksen's business in 1982 over 1981 did not follow the general market and that it was "very possible" that the decline from 1982 to 1983 was due to Vermont Castings' actions against Isaksen. Tr. 4B pp. 33-34. He testified that ". . .it is almost impossible to put precise numbers on these many unique factors at work and so we go to where we have large numbers like large numbers of distributors or something to compare it to." Tr. 4B p. 27.

REASONS FOR GRANTING THE PETITION

The first two questions presented in this petition are similar to the questions presented in *Business Electronics Corp. v. Sharp Electronics Corp.*, 55 U.S.L.W. 3820 (Case No. 85-1910, June 8, 1987) in which this Court granted certiorari. In this case, like *Business Electronics* there is an attack upon the 76 year old decision of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and cases following it. In this case the attack is in the form of a restrictive determination as to what constitutes a conspiracy or combination and what are damages in a dealer versus manufacturer controversy.

We respectfully submit that certiorari should be granted for the foregoing and the following reasons:

(a) The determination of the court of appeals as to absence of a conspiracy or combination among retailers and a manufacturer-retailer is in direct conflict with the decision of this Court in *Dr. Miles Medical Co., supra; Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U.S.

441 (1922); *United States v. Parke Davis & Company*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

(b) The decision of the court of appeals with respect to proof of damages is in direct conflict with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and the cases of this Court cited therein.

(c) Direction is needed as to when a remittitur of damages should be allowed so as to avoid the exercise of an arbitrary discretion as to whether there should be another trial.

(d) The court of appeals denied to petitioner procedural due process when it authorized the granting of a new trial on grounds waived in the district court and not raised in the court of appeals.

In the absence of relief by certiorari at this time, the August 4, 1987 mandate of the court of appeals in this case would have to be followed by the district court and the errors of the court of appeals could not be later overturned upon review of the district court's proceedings pursuant to the mandate. *Briggs v. Pennsylvania Railroad Company*, 334 U.S. 304 (1948). The rulings of the court of appeals are fundamental to the further conduct of the case. Therefore, certiorari may and, we respectfully submit, should be granted. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

1. The Court Should Reaffirm *Dr. Miles* in Its Full Breadth

The opinion of the court of appeals unquestionably was influenced by the theoretical belief that nothing can be wrong with a price setting agreement among retailers of a product and the supplier of a product even where the supplier is also a retailer in direct competition with the other retailers. The court argued that a person who chooses

not to follow the agreement would take a free ride on the selling efforts of another dealer. App. 2a-2b. If such theorizing were permitted, it would bear little relationship to the facts in this case. The product, i.e., wood burning stoves, has been effectively sold by advertising and mail orders. Further, the evidence shows that Vermont Castings and Bowditch rode free on Isaksen's development of the Madison market for Vermont Castings stoves.[1]

But such theorizing is not permitted. Judicial theories as to what makes the best policy do not have a place under the separation of powers of the Constitution.[2]

There can be little doubt that the 76 year old holding of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) is under attack by this type of economic theorizing. The decision below is only one of a succession of hostile decisions in the Seventh Circuit. *See, Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987); *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); and *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), *cert. denied* 469 U.S. 1018 (1984).

In this case the court of appeals simply did not discuss several damaging segments of evidence, saying only that there is no evidence of a concert of action other than dealer complaints. App. p. 4a. One segment pertains to Bowditch's requests for action against Isaksen because of his prices and Vermont Castings' subsequent exclusion of Isaksen from its referral and mailing programs and inducement of Bowditch to give up his Rockford, Illinois

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[1]*See*, Carstensen, *Legal and Economic Analysis of Distribution Restraints: A Search for Reality or Myth-making?*, in Issues After a Century of Federal Competition Policy, ch. 5 (R. Wills, J. Caswell and J. Culbertson, ed. 1987)

[2]*See, United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) where the court held that "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive."

operation to come to Madison, Wisconsin wherein Vermont Castings agreed to "take care of" Isaksen. Bowditch asked Vermont Castings to do something about Isaksen's prices and it threatened Isaksen and did several things which were very injurious to Isaksen, saying at one point that it was doing so because of dealer complaints about his prices.

The bringing of Bowditch to Madison is strikingly similar to the facts in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) where the Court, speaking through Justice White, held as a matter of law that bringing a competitor into the territory of a price non-complier because of the prices charged by the non-complier, where the competitor knows of the reason, constitutes a combination in violation of §1 of the Sherman Act. In this case there was not only a combination, but there was an agreement by one party to come in exchange for an agreement by the other party "to take care of Greg".

It is inconceivable that any competing retailer who has secured the coercion and injury of Isaksen by his requests for action would believe that Vermont Castings would tolerate his non-compliance with the price schedules. Indeed, a message was sent to all retailers that they must comply or suffer the consequences; and all have complied except for a very few and they are not located in the Midwest. That threat, together with the compliance, produced a combination or conspiracy as clearly as any written agreement. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 41-47 (1960); *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U.S. 441, 454-455 (1922); and *Lehrman v. Gulf Oil Corporation*, 464 F.2d 26, 33 (5th Cir. 1972), *cert. denied* 409 U.S. 1077 (1972).

At the heart of this matter is an effort to have the judiciary exercise the lawmaking function because those who favor a change in the antitrust law perceive that it cannot be accomplished through the Congress.

The Constitution vests all lawmaking power in the Congress, not the judiciary. Art. I, sec. 1. One should not have to argue the policy reasons for that separation of powers. But as stated in the 1776 Virginia Declaration of Rights, "no free government . . . can be preserved to any people but by . . . frequent recurrence to fundamental principles." Sec. 15. One reason is the need for stability in the law. If the judiciary may change the law in adjudicated cases, no one knows how to govern his conduct except by analyzing the economic and political persuasions of whosoever may be in judicial office. As Justice Marshall, speaking for the Court, stated in *United States v. Mason*, 412 U.S. 391, 399-400 (1973), ". . .If the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." If the law were, as the court of appeals would have it, that a combination and conspiracy as these terms have heretofore been defined by this Court could be legitimately made by Vermont Castings and its dealers, Isaksen would have known that he had to comply with the conspiracy. But there is no basis for any such knowledge.

The separation of the judicial power from the legislative power set forth in Article I, Section 1 and Article III, Section 1 of the United States Constitution is based on bitter experience in English constitutional history. In the Stuart era, the Privy Council, the highest judicial authority, also exercised legislative and religious powers. 4 Holdsworth, *A History of English Law*, 87 (1924). The law was changed in adjudicated cases by the highest judicial body to fit the exigencies of the situation. *Id.* In the colonies judges were agents of the crown depending on its will and the 8th and 9th grievances of the Declaration of Independence decried this state of affairs. James Madison, in arguing in support of the proposed new constitution, stated that:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . *The Federalist No. 47.*

Alexander Hamilton, making the same point, stated:

> I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers". . . .
>
> . . . .
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> . . .To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . . *The Federalist* No. 78.

We do not have here a situation like that recognized by the dissent of Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-410 (1932) where, arguing that a case on constitutional law should be overruled, he stated:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. . . . In cases involving the Federal

> Constitution the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

There is more to the separation of powers requirement than predictability of the law. There is a question as to who should make the law, elected representatives or officers appointed for life. And beyond that are the freedoms of speech, press and petition which are exercised quite freely in the case of Congressional deliberations but very poorly with respect to judicial deliberations. In this day when the courts are frequently requested to protect First Amendment freedoms, it is inconceivable that the judiciary should be a major force in destruction of those freedoms by undertaking the lawmaking function. Yet this clearly is what is being advocated by the court of appeals and what has actually happened in this case.

The views of Madison and Hamilton cannot be better illustrated than by the tragic case which set the stage for the Civil War in this country with the consequent loss of 600,000 men and women. The Missouri Supreme Court in 1852 by a two to one decision changed the law whereby a man, who under the law of that state had been free for 14 years, was enslaved, saying that "[t]imes now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery. . . ." *Scott v. Emerson*, 15 Mo. 576, 586 (1852). Judge Gamble, in his courageous dissent, stated the proper role of the judiciary, saying: ". . .Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions, but in those principles, which are immutable." *Id.* at 591-92.

When Congress, in 1890, enacted the Sherman Act, it specified that suits for treble damages may be brought "without respect to the amount in controversy." Ch. 647, 26 Stats. 209, 210 (1890). The amount in dispute required for jurisdiction at that time was $2,000.00. Ch. 866, 25 Stat. 433, 434 (1888). Even a $500.00 suit was permitted. Congress could not have expected a $2,000.00 or less claimant to have to litigate whether an undisputed price fixing agreement was "reasonable" or argue the applicability or inapplicability of economic theory with the enormous litigation costs needed to establish that kind of a case. Congress chose which economic theory should be followed. And Congress has not changed its choice except for the Miller-Tydings Fair Trade Amendment, Ch. 690, 50 Stat. 693 (1937) which was repealed by Pub. L. No. 94-145, 89 Stat. 801 (1975)[3]

The 1911 decision of *Dr. Miles* is precisely in accord with the intent of Congress. The following statement in the House of Representatives by Mr. Culberson of Texas, who was in charge of the bill, is illuminative. Mr. Morris of Massachusetts asked Mr. Culberson ". . .for the information of the House and the country, to explain what will be the bearing of the bill upon the manufacturers of proprietary articles, who fix a price upon their own goods." 21 Cong. Rec. 4089 (May 1, 1890) The Congressional Record reports as follows:

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[3]Even during the existence of the Miller-Tydings proviso, the combination and conspiracy involved here could not have been legal. See, *United States v. McKesson & Robbins*, 351 U.S. 305 (1956). Significantly, every session of Congress from 1914 to the 1937 enactment of the Miller-Tydings Amendment had seen that body reject resale price maintenance legislation. J. Palamountain, *The Politics of Distribution* 236, 241 (1968). The disparagement of this case by the court of appeals because of the size of Vermont Castings' market, App. p. 2a, flies directly in the face of the holdings of this court that "no specific magnitude need be proved." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785 (1975).

MR. CULBERSON, of Texas. Very well; I will suppose, Mr. Speaker, that there is a corporation in Massachusetts manufacturing a polish called the "Rising Glory," for instance. They sell to their patrons in Texas this product at what they call a bottom price, provided the dealer with the firm in question will sign a written agreement that he will not sell the product below a given price. If he signs such contract they allow him 5 per cent. profit on the sales, and besides the 5 per cent. profit they allow him a drawback in the shape of a percentage, the amount of which I do not need to specify. That may vary.

Now, I take it, with all due deference to what the Supreme Court may ultimately decide, that that *is a contract in restraint of trade within the meaning of the bill.* In other words, this firm sells this product to a purchaser, who refuses to give this written obligation, not at the bottom, but at a far different and higher price, reserving the lower rate for the person who may agree to the private terms they impose.

The object of this peculiar contract is to force every dealer in the country who deals in that particular product to purchase from them, and if he does not, or if he does not conform to the price they choose to fix upon the commodity, they will make him pay more than if he was a regular customer, and more than another man who enters into the contract or private agreement with the manufacturers. That is in restraint of free and liberal trade, as I take it, and tends to destroy competition. *The customers of the manufacturer are not allowed to sell at a lower rate than that fixed by the manufacturer*—I do not, of course, allude to the occupation of the gentleman, for I do not know whether I strike it or not

> in the illustration—but goods shipped from one State to another under such contracts would be liable to forfeiture under the provisions of this bill. *Id.* (Emphasis added).

Mr. Culberson did not allude to reasonableness or to selling expenses or any of the other reasons which are argued for today as an excuse for a conspiracy.

Dr. Miles was not an aberration. The aberration was *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The Supreme Court attempted to correct the mistake as much as possible three years later in *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). The only excuse for *Colgate*, after *Beech-Nut* is *stare decisis*. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) did not overturn the *Colgate* dictum that a manufacturer may announce a retail price list and cease doing business with anyone who does not follow it without engaging in an unlawful conspiracy, but at the same time did not enlarge the *Colgate* exception. Indeed, the *Monsanto* court reaffirmed *Dr. Miles*.

The question presented to the Court in *Monsanto* related to "conspiracy". No question was presented with respect to a "combination". *Beech-Nut*, *Parke Davis* and *Albrecht* hold that combinations arise where there is not an agreement but where price conduct follows coercion.

The court below acknowledges that there is coercion when a manufacturer tells its dealers that it will cut them off if they do not charge what the manufacturer wants. App. p. 8a.

A threat to not make contracts which produces a combination is no more sacred than a contract which produces a conspiracy. Nevertheless, counsel for *Colgate* argued to this Court in the *Colgate* case that there can be no combination unless it is voluntary. *See* Brief for Colgate & Company, Defendant in Error, at 38, United States v. Colgate & Company, 250 U.S. 300 (1919). That argument and the

Colgate dictum (the case was decided on the technical construction of an indictment by the trial court to the effect that it did not charge that a contract was made) are not only contrary to the succeeding *Beech-Nut*, *Parke Davis* and *Albrecht* cases but are contrary to the previous decision of the Court in *Eastern States R.L.D. Asso. v. United States*, 234 U.S. 600, (1914) wherein the Court repeated its earlier holding in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) that:

> "It [the Sherman act] covered any illegal means by which interstate commerce is restrained . . . whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, *coercion*, *threats*, *intimidation*, and whether these be made effective, in whole or in part, *by acts*, *words*, *or printed-matter*." 234 U.S. at 611. (Emphasis added)

Eastern States and *Gompers* did not contemplate that one type of coercion would be permissible and another would not.

Because the *Colgate* dictum is an aberration it should not be in any way expanded upon and the Court has so held on numerous occasions. *Dr. Miles*, *Beech-Nut*, *Parke Davis* and *Albrecht* should be reaffirmed in the clearest of terms.

2. The Decisions of This Court Clearly Establish That the Practice Stated in Question No. 2 Show a Conspiracy or Combination in Violation of the Sherman Act

The court of appeals held that the evidence in this case sustained only a finding of an unwilling agreement between Isaksen and Vermont Castings. Therefore, it held that there could not be recovery of damages due to injurious actions taken by Vermont Castings against Isaksen which did not pertain to the unwilling agreement.

As pointed out in the preceding section of this petition the requests for actions against Isaksen, the taking of various economic actions against him, threatening him plus the action of bringing Mr. Bowditch to Isaksen's territory and the agreement to "take care of" Isaksen are not within the *Colgate-Monsanto* exception and are forbidden by the Sherman Act. The *Colgate-Monsanto* exception did not involve a manufacturer in direct retail competition with the dealers,[4] did not involve a double-tongued statement of policy as to non-compliance with the price schedules and did not involve the types of coercion here involved.

Said activities of Vermont Castings and the other retailers should be viewed in the setting of the furnishing of current price information. A jury should be able to reasonably believe that, when one of several directly competing retailers having economic control over the others informs the others what its retail prices are going to be *and* of the price structure that it recommends that the others follow, it is expected that the "recommended" prices be followed. When the "recommendations" are followed a jury may rightfully believe that an unlawful combination has occurred. The court of appeals should have adhered to *United States v. Container Corp. of America*, 393 U.S. 333, 336-337 (1969); *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16 (1978) and *Great A. & P. Tea Co. v. F.T.C.*, 440 U.S. 69, 80 (1979) which hold that exchange of current price information is anticompetitive. By use of its power to target a non-complying retailer with disadvantages action Vermont Castings was able to effectively coerce practically all of its retailer competitors to toe the line.

The same evidence which the court of appeals held was evidence of coercive action against Isaksen and which

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[4]The dual position of Vermont Castings as a retailer and manufacturer does not allow it to wear only the mantle of the manufacturer. *See, McKesson & Robbins*, n. 3 above, 351 U.S. at 312.

secured his temporary compliance was coercive of other dealers. When their compliance was obtained an unlawful combination occurred under the rule of *Beech-Nut*, *Parke Davis* and *Albrecht* which was left intact by *Monsanto*.

3. The Damage Award Was Not Unreasonable. If It Were Excessive the Court Below Should Have Determined the Excessiveness and Permitted a Remittitur

The petitioner proved without controversy that the profits from his business declined approximately $100,000.00 over a period of three years in comparison to either (a) the year before the injurious actions against him were taken ($34,130.00) or (b) an average of the five years before that year ($31,078.00). He testified that the loss of that amount was due to Vermont Castings' injurious actions and not due to any decline in the market, stating that his market knowledge was of the Madison market. The respondent showed that nationally the market for Vermont Castings' stoves declined at the rate of approximately 10% per year. In arriving at its award for past damages the jury appears to have used the 10% per year figure in relation to $100,000.00 for three years and deducted from petitioner's claim the sum of $30,000.00.[5] Also, the award of $30,000.00 for future damages amounted to approximately one year's net income that Isaksen had been accustomed to receiving from his business. It makes sense from the conservative point of view in light of Isaksen's testimony that in 1986, up to the time of trial, he was operating at a substantial loss. The jury obviously declined to give anything for the remainder of the 10 years that the petitioner's accountant had testified to.

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[5]A precise mathematical computation of a decline of 10% per year would have yielded the figure of $78,681.00 if the $31,078.00 measure were used against the income or loss from Isaksen's business for 1983, 1984 and 1985.

Assuming the conspiracy or combination was as extensive as we have submitted herein, how was the award excessive? We submit that the ruling of the court of appeals that there has to be more evidence on the effect of the market, App. p. 9a, is contrary to the settled decisions of this Court. The jury accepted a subtantial part of respondent's evidence on this point. To require that the petitioner go back and relitigate damages causes unjustified expense and gives respondent a second chance at defeating petitioner's claim, a second "kick at the cat". The Seventh Amendment to the constitution does not permit repeated retrials without good reason. *Spurlin v. General Motors Corp.*, 528 F.2d 612, 619-620 (5th Cir. 1976), *reh. den.* 531 F.2d 279 (1976).

What else could the petitioner do to prove his damages? The jury's award was remarkably precise and conservative. The antitrust violator is not in a position to complain about a need for more concrete or detailed proof. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266 (1946); and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378-79 (1927) hold that the before and after comparison of business is proper. The violator has the burden of showing that the decline in profits is "attributable to other causes." *Zenith Radio*, 395 U.S. at 124. Vermont Castings tried to show that a national decline in the stove business contributed to Isaksen's decline. Further, it presented testimony by the chairman of the economics department of the University of Wisconsin. The jury's decision adopted the 10% decline theory. The matter was fully tried. It is unfair and improper to try it over again.

The court of appeals said that further consideration must be given to possible free riding, saying that if profits in the comparison years are due to that, they may not be used. This is an unnecessary dictum. This particular free riding claim was not made in any argument to the jury, was not

made to the court of appeals, and could not be made because the $31,078.00 measure was for years prior to the Vermont Castings dealership. Further, we submit that to introduce a free riding concept into the question of damages as was done in *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986), would make it impossible for a retailer who did not have a past business history in similar lines, as did Isaksen, to prove damages. Price competition assumes that one may be obtaining business that someone else might have, as well as generating business that no one would have if there had not been price competition. There is no way to separate out these elements. *Local Beauty* was not required by *Monsanto;* rather, we submit that it was another unjustified effort to limit *Dr. Miles.*

The court of appeals' statement that $100,000.00 ($70,000.00 for past damages and $30,000.00 for future damages) was pulled out of a hat in which an expert had done the usual magic tricks, App. p. 10a, like the initial statement that "this is a rather sorry excuse for an antitrust claim," App. p. 2a, reflects an antagonism against a retailer versus manufacturer antitrust claim rather than a statement of reality with respect to the damage proof. The testimony of the expert certified public accountant was not necessary at all to sustain the jury's award.

If and when there is excessiveness in a damages award, we submit that the court which reaches that conclusion should state the amount by which it determines the award to be excessive and allow the plaintiff the option of accepting an award reduced by the excessive amount, unless the court finds that passion or prejudice is involved.

It has been the practice since at least 1822 for federal courts finding an award to be excessive, in the absence of passion or prejudice, to give the plaintiff the option of accepting a lower amount reflecting deduction of the excess rather than submitting to a new trial. *Dimick v. Schiedt*, 293 U.S. 474, 482-83 (1935); *Arkansas Valley Land and*

Cattle Co. v. Mann, 130 U.S. 69, 72-74 (1889); *Northern Pacific R.R. Co. v. Herbert*, 116 U.S. 642, 646-47 (1886); *Lehrman*, 464 F.2d at 47; 6A Moore's Federal Practice, Par. 59.08[7] pp. 59-187 to 59-212 (1986).

In order to avoid the exercise of an arbitrary discretion, courts that determine that a verdict is excessive should also determine by what amount it is excessive and permit a remittitur of the excess in lieu of a new trial, unless passion or prejudice is found. Elementary fairness requires that the court give reasons for not permitting a remittitur. Otherwise a cog is placed on the right to a jury trial by requiring repeated jury trials as a condition for recovery. Cf. *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 87-92, 102 N.W.2d 393 (1960).

4. The Respondent Waived Any Right to a New Trial Because of Grounds Other Than Excessiveness of the Award; and the Court of Appeals' Ruling on This Matter Deprived Petitioner of Procedural Due Process

The court of appeals ruled that the district court did not comply with Rule 50(c)(1) of the Federal Rules of Civil Procedure by ruling on that part of respondent's alternative motion for a new trial pertaining to grounds other than excessiveness of the jury award. App. p. 10a. Vermont Castings did not press the trial court for a ruling on these points; nor did it claim any error of the trial court in this regard in the court of appeals. The conclusion of its brief in the court of appeals reads, "If the trial court's order granting judgment notwithstanding the verdict is reversed, the case *should be remanded for a new trial on damages.*" (Emphasis added).

It is a rule of the Seventh Circuit that if an alternate motion for a new trial is not passed upon by the district court and the motion is not thereafter pressed, it is waived. *Oberman v. Dun & Bradstreet*, 507 F.2d 349, 353 (7th Cir. 1974); *Vera Cruz v. Chesapeake & Ohio Railroad*, 312

F.2d 330, 332 (7th Cir. 1963) *cert. denied* 375 U.S. 813 (1963)[6]; Cf. *Nat. Metalcrafters v. McNeil*, 784 F.2d 817, 825 (7th Cir. 1986) *cert. denied* 107 S.Ct. 403 (1986). The failure to press the point in the court of appeals was an additional waiver of the point. Fed. R. App. P. 28(a)(4) and (b); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740 (8th Cir. 1985). The action of the court of appeals in changing its own rules and contravening the Federal Rules of Civil Procedure after the briefs were submitted deprived petitioner of procedural due process of the law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-82 (1930); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). If respondent had pressed its point in the district court, the petitioner would have had an opportunity to argue to the court of appeals any perceived error. This late revival of a procedural point is extremely prejudicial. It gives to the district court an unreviewable authority. *Mays v. Pioneer Lumber Corporation*, 502 F.2d 106, 110 (4th Cir. 1974), *cert. den.* 420 U.S. 927 (1975).

5. Conclusion

For the reasons set forth above, we respectfully submit that a writ of certiorari should be issued in this matter.

Respectfully submitted,

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[6]Courts of appeals in other circuits have different rules. 5A Moore's Federal Practice, Par. 50.14, p. 50-105 (1986).

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October, 1987

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 86-2818

GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Plaintiff-Appellant,

v.

VERMONT CASTINGS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 85 C 882—John C. Shabaz, Judge.

ARGUED APRIL 22, 1987—DECIDED AUGUST 4, 1987

Before POSNER and FLAUM, *Circuit Judges*, and WILL, *Senior District Judge**

POSNER, *Circuit Judge*. A dealer in woodburning stoves, Isaksen, claims in this suit that his supplier, Vermont Castings, coerced him to raise his retail prices for its stoves, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. There are also pendent claims, which the district court dismissed before trial, and of which more anon. The jury returned a verdict of $100,000 in damages, which was trebled as required by law, but then the district judge granted Vermont Castings judgment notwithstanding the verdict, noting in passing that the damage award was in

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* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

any event excessive. 644 F. Supp. 1098 (W.D. Wis. 1986). Isaksen appeals.

This is a rather sorry excuse for an antitrust case, which may more than anything explain the district judge's action in granting judgment for Vermont Castings. Founded in 1975, Vermont Castings has, as the plaintiff admits, only 10 percent of the midwestern "market" in free-standing woodburning stoves (which are used for heating). We have difficulty understanding how free-standing woodburning stoves could be a meaningful product market, given such excellent substitutes as oil-burning and gas-burning furnaces; and how, even if they do compose a meaningful product market, a product shipped all over the country can be said to be sold in distinct regional markets. But even ignoring these problems, we would have difficulty understanding how a 10 percent factor in a tiny market could restrain competition (viewed as a means of promoting economic efficiency—the contemporary antitrust view, see, e.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986)) merely by placing a floor under its dealers' prices ("resale price maintenance"). If the floor were set higher than necessary to induce dealers to provide the point-of-sale services that would maximize the sales of Vermont Castings' stoves, Vermont Castings not only would be transferring wealth from itself to its dealers (and why would it want to do that?) but would be pricing its stoves out of the market; consumers would switch to competing products whose retail prices were not inflated by resale price maintenance. It is easy to see, however, why, whether or not it possessed any market power, Vermont Castings might want to set the lowest floor under the retail prices of its stoves that would induce its dealers to provide the level of point-of-sale services that maximizes the welfare of consumers. See Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. Law & Econ. 86 (1960). As a new company, selling a somewhat complex product, Vermont Castings needed and

still needs dealers who understand the product, can explain it to consumers, and can persuade them to buy it in preference to substitute products made by more established firms. These selling efforts, which benefit consumers as well as the supplier, cost money—money that a dealer can't recoup if another dealer "free rides" on the first dealer's efforts by offering a discount to consumers who have shopped the first dealer. (The second dealer can afford the discount because he doesn't have to incur the selling expenses that were incurred by the first dealer.) As one of Vermont Castings' dealers explained in a letter to it, "The worst disappointment is spending a great deal of time with a customer only to lose him to Applewood [Isaksen] because of price. . . . This letter was precipitated by the loss of 3 sales of V.C. stoves today [to] people who[m] we educated & spent long hours with." A retail price floor prevents such free riding and thus encourages dealers to provide necessary point-of-sale services. And the supplier has every incentive to keep the floor as low as is consistent with assuring adequate services, since he doesn't want to make his product noncompetitive.

Yet as Isaksen keeps reminding us, arguments of this sort have not persuaded the Supreme Court to relax the judge-made rule, now more than 75 years old, that makes resale price maintenance illegal per se under section 1 of the Sherman Act, regardless of the circumstances of its adoption. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980). So all we must determine, on the liability phase of this case, is whether Isaksen put in enough evidence of resale price maintenance to get to the jury.

Vermont Castings gave a suggested retail price list to all its dealers, together with assurances that the prices were only suggested and that the dealers could sell at any price they wanted. Isaksen sold way under list price, and competing dealers bombarded Vermont Castings with com-

plaints about him; the letter we quoted was one of these complaints. Beyond this the evidence is sharply contested, but of course we must view it as favorably to Isaksen as the record warrants, since the jury found in his favor; nor can we disregard the verdict merely because almost all of the evidence favorable to Isaksen came from his own mouth.

Isaksen testified that when Vermont Castings discovered how low his prices were, it began to threaten him, and otherwise harass him, in a variety of ways. Although Vermont Castings denies any harassment, this was something for the jury to sort out. Harassment by itself, however, would not violate section 1 of the Sherman Act, a section that punishes only contracts, combinations, and conspiracies in restraint of trade and thus requires concerted action; harassment is unilateral. If, though, the harassment were pursuant to an agreement between Vermont Castings and its other dealers, the agreement to harass would be actionable. But there is insufficient evidence to justify an inference of agreement between Vermont Castings and its other dealers. Complaints to a supplier, made by competitors of a dealer who is cutting prices below suggested levels, are not, standing alone, evidence of agreement. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); see also *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, No. 86-1040, slip op. at 8-9 (7th Cir. June 3, 1987); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1439-40 (7th Cir. 1986), and cases cited there. They may merely alert the supplier to the existence of a condition injurious to *him*, thus entitling him to take action to protect himself, regardless of the dealers' motivations in complaining. Vermont Castings may, as we have seen, have had its own reasons for wanting every dealer to sell at its suggested retail prices; so the fact that it may have harassed Isaksen in an effort to obtain his compliance is not evidence that it was acting in concert with the other dealers. Yet there is no other evidence of such concert.

With a conspiracy between Vermont Castings and its other dealers ruled out, the harassment of Isaksen could be actionable under section 1 of the Sherman Act only if it succeeded in getting him to agree to raise his prices. Vermont Castings could not concert with itself and was not proved to have concerted with any of its other dealers. The only agreement between it and Isaksen that could (on this record) have violated the antitrust laws would have been an informal agreement by Isaksen, knuckling under to pressure by Vermont Castings, to raise his prices.

Isaksen testified that Vermont Castings told him to raise his prices or it would mix up his orders and that in response to this threat he did raise his prices. The fact that Isaksen may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of section 1. See *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960). A conspiracy is not less sinister because some of its members are intimidated, rather than bribed, into joining it. Some cases even say that the plaintiff in a "vertical" price-fixing case such as this (that is, a case where the alleged price-fixing agreement is between firms at different levels in the production-distribution process, rather than between competing firms) must prove he was coerced. See, e.g., *Bender v. Southland Corp.*, 749 F.2d 1205, 1212 (6th Cir. 1984). But all they mean is that a plaintiff who is an involuntary participant must prove that the defendant induced his participation by conduct that went beyond merely announcing a policy of terminating dealers who sell below suggested retail prices; for such an announcement is privileged under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 707 (7th Cir. 1984).

Isaksen also testified, however, that although the threat was made in September 1982, he didn't raise his prices until a year later. He admits that during the entire year

Vermont Castings never carried out its threat to mix up his orders. The timing casts serious doubt on the existence of a causal relationship between the threat and the raising of prices, for how can it be that the threat did not move him to act until the passage of time had shown the threat to be empty? He could have had other reasons for wanting to raise his prices in September 1983, including an expensive advertising campaign that he conducted in the fall of that year. Moreover, with one ambiguous exception the acts of harassment of which he complains (such as Vermont Castings' omitting him from a list of its dealers in a newspaper ad it ran) occurred *after* he finally raised his prices, rather than before.

Although such an analysis of the evidence might have furnished compelling grounds for granting Vermont Castings' motion to set aside the verdict as contrary to the clear weight of the evidence—and may yet do so, since the district judge has never ruled on the motion—it does not support the grant of judgment notwithstanding the verdict. Such judgment is proper only if, when the evidence is viewed in the light least favorable to the moving party, the verdict is unsupported. Given Vermont Castings' incentive to get Isaksen to agree to raise his prices, and his testimony that he did so, albeit belatedly, in response to Vermont Castings' threats, we cannot conclude that the verdict had no basis in the evidence. However, the verdict may, as we have said, have been so contrary to the weight of the evidence, as evaluated by the district judge in light of the witnesses' credibility and other relevant considerations, that a new trial is warranted. That is, the district judge might conclude that the verdict was not reliable enough to justify terminating the litigation without the additional confidence that a second verdict, rendered by a different jury, might impart if it agreed with the first verdict. This is a discretionary determination that must, if only because it involves a consideration of the witnesses' credibility, be made by the district judge rather than by the court of

appeals. On the difference between the standards for motions to grant judgment notwithstanding the verdict and motions for a new trial because the verdict was against the clear weight of the evidence, and on the difference in the appellate court's role in reviewing orders ruling on the two types of motion, see *Spanish Action Committee v. City of Chicago*, 766 F.2d 315, 319-21 (7th Cir. 1985).

In defending the judgment, Vermont Castings points us to a footnote in *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 465 U.S. at 764 n. 9:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Vermont Castings reads this literally, to mean that unless Isaksen said to it, "I agree to adhere to your suggested retail prices," there was no agreement for purposes of section 1. If footnote 9 is interpreted in this way, however, a more explicit agreement would be required to establish concerted action under the Sherman Act than to establish a contract enforceable under the Uniform Commercial Code. We imagine that all the Court meant was that the mere fact of adherence to suggested retail prices does not establish an agreement to adhere to them. (But see Hay, *Vertical Restraints After Monsanto*, 66 Cornell L. Rev. 418, 435 (1985), adopting—and effectively criticizing—the literal reading.) If adherence alone could prove an agreement to adhere, the *Colgate* privilege—which allows a supplier to "coerce" the dealer's adherence by threatening to cut him off if he doesn't adhere, and which was strongly reaffirmed in *Monsanto*, *supra*, 465 U.S. at 763-64; see 7

Areeda, Antitrust Law ¶ 1446, at 85-86 (1986)—would be nugatory. Footnote 9 is a part of the discussion reaffirming *Colgate*. If a manufacturer distributes a price list, together with an announcement that he will cut off dealers who sell below the list prices, and dealers adhere to those prices because they don't want to be cut off, there is a realistic sense in which the threat of termination has induced the dealers to agree not to cut prices—to agree, in other words, to fix prices. That is the argument against *Colgate*. *Monsanto* rejects it. Nor can a dealer be allowed to manufacture an agreement by saying "I agree to abide by your suggested prices," when he has not been asked to agree. But we do not think the Court intended to go so far as to rule that if a supplier telephones a dealer and tells him, "Raise your price by next Thursday, or I'll ship you defective goods," and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer's resale price. If it were not, there would be very little left of the rule against vertical price-fixing, which the Court in *Monsanto* decided not to reexamine. See 465 U.S. at 761 n. 7. Professor Areeda points out that after *Monsanto* "no agreement is formed when a dealer unwillingly complies solely because he wishes to avoid termination." 7 Areeda, *supra*, ¶ 1451e, at p. 128. This is just *Colgate* again; the motives for the dealer's adhering to a suggested list price are irrelevant. If (but only if) he *agrees* to adhere (having been asked to), there is an agreement, no matter how unwilling he is; but it does not follow that his agreement to adhere can never be implicit, or signified by conduct in lieu of promissory language.

Vermont Castings' list of suggested prices stated that the dealer was not being asked to agree to adhere to them, and was free to depart from them; so if Isaksen did adhere, clearly it was not because he had agreed to do so, whether implicitly or explicitly, on the basis of a solicitation in the price list—there was no solicitation. Any agreement came later, when Vermont Castings told Isaksen, "Raise your

prices or else," and Isaksen raised his prices only because he feared that otherwise Vermont Castings would wreck his business by mixing up his orders. It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.

Although we think the district judge erred in granting judgment for Isaksen notwithstanding the verdict, we agree that the damages are grossly excessive. Unlike the usual dealer antitrust case, Isaksen was not terminated, so he can claim damages only from (1) the harassment that supposedly induced him to agree to raise his prices or punished him for having been slow to honor the agreement, and (2) any profits, not due to free riding, that he lost during the months when (against his better business judgment) he raised the prices he was charging for Vermont Castings stoves, as he had agreed—we are assuming—to do. The second point requires elaboration. Although Isaksen may well have suffered losses during the period of Vermont Castings' unlawful activity, he made no effort to establish how much of the loss was due to that activity as distinct from unrelated business factors. The most important such factor was the diminished demand for woodburning stoves. Not only had the market for such stoves become saturated, but oil prices had begun to fall, making wood a less attractive fuel for heating, relative to oil, than it had been before. All Isaksen did to prove damages was to compare his average profits for several years before and several years during the period of unlawful activity. *Post hoc ergo propter hoc* is not a valid methodology of damage calculation, especially when it is apparent that other causal factors are at work.

A further wrinkle is that if Isaksen's profits before he knuckled under to Vermont Castings' pressure were due in part to his taking a free ride on other dealers, who provided valuable point-of-sale services that he did not provide, he could not use those profits as his benchmark in

calculating the loss of profits that was caused by his raising his prices later under pressure from Vermont Castings. The prevention of free riding is not, as yet anyway, a defense to a charge of resale price maintenance; but neither is being prevented from taking a free ride on another dealer's efforts a form of antitrust injury compensable by a damage award. See *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1202 (7th Cir. 1986); cf. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, *supra*, 737 F.2d at 709.

The jury pulled the figure of $100,000 out of a hat in which Isaksen's expert witness had done the usual magic tricks; but as there was no evidence of how much the antitrust violation, as distinct from unrelated market forces, contributed to Isaksen's losses, or of how much of the loss was an antitrust injury as distinct from a purely private loss from being deprived of the opportunity to take a free ride on competing dealers, the expert's efforts to translate his losses into a present-value figure were irrelevant. We do not allow antitrust plaintiffs or any other plaintiffs to obtain damage awards without proving what compensable damages were actually suffered as a result of the defendant's unlawful conduct. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, *supra*, 797 F.2d at 382-83.

So the damage phase of the trial must be retried. The liability phase may well have to be retried as well. The judge, unfortunately, did not comply with Rule 50(c)(1) of the Federal Rules of Civil Procedure, which requires a judge when he grants judgment notwithstanding the verdict to rule at the same time on the movant's alternative motion for a new trial, so that both rulings can be reviewed in the same appeal rather than successive appeals. Vermont Castings based its motion for a new trial not only on the excessiveness of the damages and the weakness of the evidence to support the finding of liability but also on alleged errors in the instructions. The judge made no ruling on the motion (although he remarked in passing on the

excessiveness of the damages), and the correctness of the instructions is not before us. On remand the judge will have to rule on the motion for a new trial. Rule 50(c)(1) is a good rule; it should be obeyed.

We move on to the pendent claims. One is shallow; this is Isaksen's claim that Vermont Castings libeled him by omitting his name from a list of its dealers that it circulated in Isaksen's market areas. (This was also one of the alleged acts of harassment.) The objection to this claim that there can be no defamation without a statement is superficial; the list is a statement, and the omission of Isaksen from the list could make the list a statement that he is not a Vermont Castings dealer. But not every slight is a slander or libel. The courts of Wisconsin (whose law applies to the pendent claims) require a threshold determination by the trial court that the imputation "tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." *Converters Equipment Corp. v. Condes Corp.*, 80 Wis. 2d 257, 262, 258 N.W.2d 712, 715 (1977) (footnote omitted). The reference to reputation is important. Omitting Isaksen's name from a list of Vermont Castings' dealers may have prevented third persons from dealing with him, but the same thing happens when the phone company accidentally drops a subscriber from the yellow pages. More is necessary than a diminution of transactional opportunities. In a business setting the imputation, to count as defamation, must charge dishonorable, unethical, unlawful, or unprofessional conduct. See *id.* at 263, 258 N.W.2d at 715. No such meaning could possibly be teased out of the omission of Isaksen's name from a list of Vermont Castings' dealers. To imply that a person is not a dealer in Vermont Castings' freestanding woodburning stoves is not to place the commercial equivalent of the mark of Cain on him.

The other pendent claim relates to the Wisconsin Fair Dealership Law, Wis. Stat. §§ 135.01 *et seq.*, which

among other things requires a franchisor—as Vermont Castings is conceded to be—to notify his franchisee in advance if the franchisor intends to do anything that will bring about a "substantial change in [the franchisee's] competitive circumstances." Wis. Stat. § 135.04; see *Remus v. Amoco Oil Co.*, 794 F.2d 1238, 1240 (7th Cir. 1986). Isaksen argues that the harassment to which Vermont Castings subjected him caused a substantial change in his competitive circumstances; and of course no statutory notice was given ("I plan to start harassing you in 90 days"). But as the harassment ended more than a year before this suit was filed, we agree with the district judge that the claim is barred by the statute of limitations. See Wis. Stat. § 893.93(3)(b).

As part of the alleged harassment, Vermont Castings demanded that Isaksen sign a new and less favorable dealership agreement and threatened to terminate him if he refused. Vermont Castings repeated this threat in a counterclaim. The counterclaim asks for a declaratory judgment that Vermont Castings is entitled to terminate him if he refuses to sign the new agreement, which all of Vermont Castings' other dealers in Wisconsin have signed. Isaksen argues that such a threat if carried out would be termination "without good cause," and would therefore violate the Fair Dealership Law. See Wis. Stat. § 135.03. The district judge disagreed, ruling that if Isaksen refuses to sign the new agreement Vermont Castings can terminate him. The judge made this ruling, however, after entering judgment for Vermont Castings on the antitrust count, and we think that a final determination of the issue must abide the final determination of antitrust liability. If as Isaksen contends Vermont Castings is trying to get rid of him because he won't play ball on prices, terminating him ostensibly for his refusal to enter into a new agreement could not be for "good cause"; a termination incidental to an antitrust violation would not be for good cause. Of course, just because Vermont Castings may have violated the antitrust laws

(though this remains to be determined, given the motion for a new trial, which the district judge has yet to act on), it does not follow that it can never change the terms of the dealership agreement to Isaksen's disadvantage. But the judge's determination as to whether the change was independent of the violation was infected, indeed determined, by his premature conclusion that there had been no violation, so he must reconsider the issue after he resolves the antitrust issue in accordance with this opinion. Circuit Rule 36 shall not apply on remand.

REVERSED And REMANDED, With DIRECTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGGAR S. ISAKSEN, d/b/a
APPLEWOOD STOVE WORKS,

Plaintiff,

v.

VERMONT CASTINGS, INC.,
a Vermont Corporation,

Defendant.

MEMORANDUM AND ORDER
85-C-882-S

In this antitrust action, defendant Vermont Castings, Inc. asks for relief from the judgment entered upon a jury verdict. The facts are as follows:

FACTS

The background facts are simply stated. Plaintiff Gregor (sic) Isaksen, doing business as Applewood Stove Works from Poynette, Wisconsin, began selling wood stoves and accessories in 1975. In early 1982 he became an authorized dealer of defendant Vermont Castings, Inc., a Vermont manufacturer of wood burning stoves and accessories. Originally a direct mail order company, Vermont Castings began developing a dealer network which by 1982 accounted for about two-thirds of its business. By 1985 only 10 percent of its sales were direct. Vermont Castings has the largest share of the wood stove market in the United States and the Midwest, holding shares of 8 percent and 10 percent, respectively.

From the beginning of the dealership arrangement plaintiff advertised throughout Wisconsin and neighboring states, emphasizing low prices for Vermont Castings stoves, prices which were below defendant's suggested retail prices. Although pricing decisions were explicitly left up to the judgment of individual dealers, defendant began

receiving complaints about plaintiff's pricing practices from other dealers almost immediately. Defendant's response to complaining dealers consisted of, essentially, a denial that it had the power to stop such practices, although Vermont Castings had some sympathy for their plight.

However, the story did not end at that point, and plaintiff asserts that later actions of defendant against plaintiff's interests were in reality designed to force him to conform to the suggested retail price. The later relations between the parties will be discussed in the body of the opinion.

MEMORANDUM

I The first part of defendant's motion for judgment after the verdict attacks the legal and factual sufficiency of plaintiff's theory that plaintiff was an unwilling co-conspirator in a price fixing conspiracy when he brought his price up to the suggested retail price in the fall of 1983. Defendant's argument is based on the simple and persuasive proposition that the facts do not conform to the requirements of such a conspiracy set forth in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). The Court stated, at 1471 (n. 9), that:

> The concept of a "meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Since it is undisputed that plaintiff never told the defendant that he was raising his prices (whether to conform to defendant's implicit demands or otherwise), it is defen-

dant's position that there was no communication of acquiescence as required by *Monsanto*.

Plaintiff's response is wholly unpersuasive. Basically, plaintiff argues that *Monsanto* did not explicity hold that a distributor's actions in compliance with a demand would not constitute acceptance. It is true that there was no such explicit holding. However, plaintiff ignores both the implication of the above quoted language and the clearly articulated reason behind the evidentiary standard adopted by the Court:

> [I]t is of considerable importance that independent action by the manufacturer, and concerted action on non-price restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

Id. at 1470. A factfinder may be justified in inferring a demand to comply with price restrictions through evidence of pricing complaints from other distributors and non-price retaliatory acts by the manufacturer. The jury here evidently did so. However, price complaints alone are clearly not enough. *Id.* at 1471. The remainder of the evidence of defendant's actions unconnected with price are certainly "highly ambiguous" inasmuch as there was evidence of continual misunderstandings and ill-feeling between plaintiff and defendant which, on defendant's part, may or may not have been related to pricing. Under such circumstances, the Court concludes that *Monsanto*

demands a clearly communicated acquiescence in defendant's suggested price before plaintiff can be said to have established a price-fixing conspiracy. Unless either the manufacturer's demand or the distributor's acquiescence is explicit, the evidence of a conspiracy is simply too tenuous to allow an award of treble damages under the antitrust law. Plaintiff here was never told by defendant to raise prices or suffer consequences, and plaintiff never told the defendant that he was raising his prices because he understood that to be defendant's demand. When it is at least debatable that a manufacturer does not mean to demand compliance with a suggested price, and plaintiff must admit that it is debatable here, the Supreme Court's requirement of a communicated acquiescence must be read literally to avoid the risk that a conspiracy will be inferred where none exists. It is not asking too much of an antitrust plaintiff to comply with this dictate since the proof of a conspiracy will be entirely within his power to produce in the circumstances illustrated by this case.

Nor can plaintiff successfully argue that there was a contract, as opposed to a conspiracy, for there is clearly no meeting of the minds produced by uncommunicated acceptance of an ambiguous offer. To rule otherwise would be to judicially create a contract at the whim of one party while the other party had no intention of being bound. None of the authority cited by plaintiff supports the proposition that an ambiguous offer, followed by performance without explicit acceptance, constitutes a contract.

Accordingly, no price-fixing conspiracy between the plaintiff and defendant was ever established. Therefore, plaintiff cannot recover on this theory.

II. Plaintiff's other theory of recovery is no less problematical, and the Court concludes that the evidence is insufficient to establish a price-fixing conspiracy between defendant and its other distributors.

As *Monsanto* made clear, something more than evidence of complaints about plaintiff's pricing practices by other distributors is necessary:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.

104 S.Ct. at 1471. As later rephrased in *Matsuishita* (sic) *Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348, 1357 (1986):

> [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

The weight of this burden was recently illustrated by the Court of Appeals in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986). The letter terminating the antitrust plaintiff in *Morrison* actually cited price cutting as one of the reasons for termination and was clearly induced by a competitor's complaint. Nevertheless, the Court determined that the evidence was insufficient to support the existence of a price-fixing agreement. The facts of *Morrison* are clearly distinguishable, but the Court's analysis is not altogether inapplicable here, as will be shown below.

A review of what evidence, other than the complaints of other dealers, plaintiff presented is in order. Early in the relevant period, defendant expressed some concern to plaintiff that his pricing policies were out of the ordinary. Also, shortly after being granted a dealership plaintiff was assured that for purposes of areas of primary responsibility plaintiff would be given access and promotional assistance in the Madison, Wisconsin area and that a competing dealer south of Madison (in Janesville) did not intend to exploit that territory. However, defendant's promotional

efforts in 1982 were geared to zip code areas, and plaintiff's competitor received assistance in the area surrounding Madison (although not in the City itself, which had zip codes assigned to plaintiff). Plaintiff objected to this assignment and was told that defendant was unable to divide mailings more specifically than by the first three digits of the zip codes. This was unsatisfactory to plaintiff, and he declined to participate in a similar program the next year. Plaintiff's name was also left off several lists of dealers contained in the defendant's publication "Owner's News" which was sent to all known owners of defendant's products. Most importantly, in 1983 defendant undertook a promotional campaign known as "Close the Loop" where potential customers who responded to company advertising were directed to dealers in their area. Plaintiff received few such referrals, but plaintiff's main competitor from Janesville (who had opened a shop in Madison with defendant's assistance) received hundreds of such referrals, including some who were very close to plaintiff's shop in Poynette. Finally, plaintiff requested that defendant dropship woodstoves to a branch store that plaintiff unilaterally opened in Superior, Wisconsin. Defendant refused to ship stoves to this store (instead shipping them to Poynette) on the ground that plaintiff needed the Company's permission to open a new store, and that plaintiff's Superior manager was a dealer with whom the defendant had previously refused to deal.

Defendant argues, and presented some evidence at trial, that it had a legitimate reason to be concerned with dealer's profit margins. The reason was that its dealers needed sufficient profits to promote the company's products. The defendant was also concerned that plaintiff's advertising of low prices in the areas served by other dealers created a "free rider" problem where a dealer's customer service efforts would be undercut, and rendered useless, by plaintiff's lower price. The defendant also argued that its dealer contract reserved the right to assign areas of primary

responsibility in its own best interest, and that some of the problems with leaving plaintiff's name off some promotional materials were the result of accident or misunderstanding.

It is clearly legitimate for a manufacturer to protect its dealers against free riders. *Monsanto*, 104 S.Ct. at 1470; *O.S.C. Corp. v Apple Computer*, 792 F.2d 1464, 1468 (9th Cir. 1986). While the evidence was scant that plaintiff had profited from free riding, it is clear that the threat was manifest. Concern with dealer profit margins is equally blameless inasmuch as defendant was phasing out its direct sales activities and needed a strong dealer network to retain its market share. The exchange of information on this subject does not subject the manufacturer to an inference of price-fixing. *Monsanto*, 104 S.Ct. at 1470.

The *Apple Computer* case cited above provides an excellent illustration of the kind of problem presented by this case. The Court cited the following evidence of record in that case as insufficient to support the inference of a price-fixing agreement where price cutting mail order dealers were terminated:

> The dealers' evidence of a price-fixing conspiracy consisted of the (1) complaints to Apple about mail order dealers' price discounts; (2) the outright and sudden elimination of mail order sales and termination of those dealers who continued such sales; (3) several meetings involving dealer and manufacturer representatives in which mail order discounting was allegedly raised; (4) a conversational statement by Apple's president that while he could not legally discuss pricing, something was going to be done about price erosion; (5) an incident in which Apple allegedly coerced mail order dealers to "get their prices up;" (6) Apple's alleged conditioning of new locations for mail order dealers upon their agreement to cease

> discounting; and (7) Apple's alleged agreement with one of the plaintiffs to not advertise prices.

792 F.2d at 1468. Clearly, this is a much stronger case than plaintiff was able to produce. The Court noted the same principles cited by this Court from *Monsanto*. The Court pointed out that Apple representatives discouraged price discussions at dealer meetings much the same way that defendant here told complaining dealers that it could do nothing about plaintiff's pricing. The Court concluded that the defendant's remark about "price erosion" was "entirely consistent with a manufacturer's right to invoke vertical non-price restraints that 'ensure that its distributors earn sufficient profit to pay for [desired] programs.' " *Id.* at 1469, citing *Monsanto*.

If all of this were not enough to dispel any inference of a conspiracy to fix prices, there is the fact that defendant simply had no motive to enter into such a conspiracy. *Matsushita* teaches that the lack of economic incentive to enter into an antitrust conspiracy is probative and compelling evidence that no such conspiracy existed:

> It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

106 S.Ct. at 1356. Defendant's concern for its own economic benefit simply had to have been confined to volume, since it sold its product to the dealers without price discrimination, and it was phasing out its own direct sales program. Therefore, the defendant had no reason to punish a dealer who sold at low prices except insofar as such price cutting impacted upon other areas of legitimate con-

cern to the company. The nigher (sic) prices which would be the result of such a conspiracy would ordinarily be expected to cut into that volume. Defendant had no apparent reason to wish such a result. As the Court of Appeals pointed out in *Murray Biscuit*, 797 F.2d at 1439-40, a problem of legitimate concern to the manufacturer will often manifest itself as a price complaint from another dealer. This does not necessarily mean that the action taken by the manufacturer in response to such a complaint amounts to price fixing. Yet that is the conclusion plaintiff urged upon the jury and the jury succumbed to these blandishments.

Accordingly, the verdict cannot stand, and defendant is entitled to judgment notwithstanding the verdict.

III. The above conclusion makes it unnecessary to address defendant's arguments in support of a new trial. The Court does note, however, that defendant would be entitled to a new trial on damages as the damage verdict was clearly excessive. While there is nothing inherently wrong with comparing profits before and during the wrongful actions of an antitrust defendant, a plaintiff must offer some foundation that the periods were otherwise comparable. Plaintiff did not do so here. Further, there was not any attempt at all to show how the reduced profits were caused by defendant's allegedly illegal activities. The conclusion was almost inescapable that plaintiff's lower profits during the relevant period before trial were, at least in significant part, the result of industry-wide depressed conditions and what amounted to distress sales by plaintiff which were not attributable to defendant's actions. Finally, given plaintiff's right to equitable relief upon success in this lawsuit and the fact that plaintiff could not ground his losses on increased competition from other dealers, future losses were, to say the least, extraordinarily speculative. The Court concludes that plaintiff simply failed to prove antitrust damages in an amount anywhere near those

awarded by the jury. *See*, generally, *MCI Communications v. AT&T*, 708 F.2d 1081, 1160-69 (7th Cir. 1983), *cert. den.*, 464 U.S. 891.

ORDER

IT IS ORDERED that defendant's motion for judgment notwithstanding the verdict is GRANTED.

Let judgment be entered accordingly, with costs to the defendant.

Entered this 3rd day of October, 1986.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Special Verdict on Liability

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGGAR S. ISAKSEN,
d/b/a Applewood Stove Works,
Plaintiff,

v.

VERMONT CASTINGS, INC.,
a Vermont Corporation,
Defendant.

SPECIAL VERDICT

85-C-882-S

1. Did the defendant contract, combine or conspire with any of its dealers to set the retail price of Vermont Casting (sic) stoves?

ANSWER: Yes
(Yes or No)

IF YOU ANSWERED THIS QUESTION "YES," PROCEED TO QUESTION 2. IF YOU ANSWERED THIS QUESTION "NO," PROCEED NO FURTHER.

2. Were defendant's actions of which plaintiff complains in furtherance of such conspiracy?

ANSWER: Yes
(Yes or No)

IF YOU ANSWERED THIS QUESTION "YES," PROCEED TO QUESTION 3. IF YOU ANSWERED THIS QUESTION "NO," PROCEED NO FURTHER.

3. Did defendant's actions cause injury to plaintiff's business or property?

ANSWER: Yes
(Yes or No)

(Signature and date lines omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREGGAR S. ISAKSEN,
d/b/a Applewood Stove Works,
Plaintiff,

v.

VERMONT CASTINGS, INC.,
a Vermont Corporation,
Defendant.

SPECIAL VERDICT

85-C-882-S

What sum of money will fairly and reasonably compensate the plaintiff Greggar Isaksen for damages to his business and/or property caused by the actions of the defendant previously found by you?

Past Damages $70,000.00

Future Damages $30,000.00

(Signature and date lines omitted)

UNITED STATES DISTRICT COURT	District WESTERN DISTRICT OF WISCONSIN
Case Title GREGGAR ISAKSEN, d/b/a Applewood Stove Works V. VERMONT CASTINGS, INC.	Docket Number 85-C-882-S Name of Judge or Magistrate John C. Shabaz

/ x / Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

/ __ / Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the plaintiff and against the defendant in the amount of $300,000.00 together with costs, to include reasonable attorneys' fees. It is further ordered that judgment is entered in favor of the defendant and against the plaintiff on its counterclaim, declaring that the defendant, Vermont Castings, Inc., is allowed to discontinue dealing with the plaintiff Greggar S. Isaksen unless the plaintiff agrees to sign the new dealership agreement, said agreement not being in violation of the Wisconsin Fair Dealership law.

Approved as to form this 20th day of June, 1986.
s/ John C. Shabaz
JOHN C. SHABAZ
U.S. District Judge

Clerk	Date
s/ Joseph W. Skupniewitz	6/20/86

UNITED STATES DISTRICT COURT	District WESTERN DISTRICT OF WISCONSIN
Case Title Greggar S. Isaksen, d/b/a Applewood Stove Works, Plaintiff, V. Vermont Castings, Inc., a Vermont corporation, Defendant.	Docket Number 85-C-882-S Name of Judge or Magistrate John C. Shabaz

This action came on for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant's motion for judgment notwithstanding the verdict is granted.

It Is Further Ordered and Adjudged that judgment is entered in favor of the defendant dismissing plaintiff's complaint with costs.

Approved as to form this 7th day of October, 1986.

s/ John C. Shabaz
John C. Shabaz
U.S. District Judge

Clerk	Date
s/ Joseph W. Skupniewitz	Oct. 8, 1986

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1987.

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. HUBERT J. WILL, Senior District Judge*

GREGGAR S. ISAKSEN d/b/a APPLEWOOD STOVES, Plaintiff-Appellant, No. 86-2818	)	Appeal from the United States District Court for the Western District of Wisconsin. No. 85 C 882 JOHN C. SHABAZ, Judge
vs.	)	
VERMONT CASTINGS, INC., a Vermont Corporation, Defendant-Appellee.	)	

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with DIRECTIONS, with costs, in accordance with the opinion of this court filed this date.

---

* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

(Exhibit 3o)

VERMONT CASTINGS INC.
Prince Street, Randolph, Vermont 05060
Telephone 802/728-3181

May 3, 1983
TO: All Vermont Castings
Authorized Dealers

We are pleased to announce our 1983 pricing schedule, the highlights of which are an increase in dealer margins as well as a new and long awaited credit plan. The key elements of the program are as follows:

1. Dealer prices, effective May 31, 1983, will increase by an average of 8%.

2. Suggested retail prices are proposed to increase by an average of 8%, a level that will allow your margin to 30%.

3. To insure dealers the opportunity to take full advantage of a 30% margin opportunity, direct prices to consumers from the factory will increase by an average of 16%.

Stoves may be ordered at 1982 prices between now and May 27. Stoves offered at 1982 prices will not be on credit. Stoves ordered on our credit program will be at 1983 prices and may be ordered beginning June 17 and must be shipped by July 15. Payment for stoves ordered on credit is due by September 15, 1983. Dealers who wish to take full advantage of transportation savings can combine stoves ordered at 1982 prices and those ordered on credit and may combine shipments prior to July 15.

(Exhibit 3o)

To insure sell through of inventory purchased during May and June and (sic) exciting promotion is being planned that will be announced at Dealer Week, June 15 through June 17 and will provide early and effective kick off to the 1983 heating season.

We are pleased to be able to offer our dealers an opportunity to strategically plan sales and profit opportunity. Attached you will find the specific details of stove prices and full explanation of the credit program. Please give these your immediate attention and call your account executive with any questions you may have.

(Exhibit 2a)

Jim Holmes
9/19/83

APPLEWOOD STOVES
POYNETTE, WISCONSIN

NEW IN-STATE WATTS LINE

800-635-0100

USE FOR PHONE REFERRALS ONLY

DO NOT MAIL ANY CLOSE THE LOOP MATERIALS

THIS DEALER ONLY RECEIVES PHONE REFERRALS

AND THIS HAPPENS ONLY IF THE CUSTOMER INQUIRES ABOUT A DEALER IN THE IMMEDIATE AREA AROUND POYNETTE.

(Exhibit 2b)

(Please use Black Pen and Fill in Completely)

EFFECTIVE DATE: 9/19/83 THIS IS AN:

A/C NUMBER: _____ _____ APPOINTMENT

DEALER CODE: 0078 X UPDATE

REGION #: 15 _____ DELETION

ACCT. EXEC: Jim Holmes PHONE REFERRALS ONLY

MAILING ADDRESS: Applewood Stoves DO NOT CLOSE THE
Poynette, Wisconsin LOOP WITH THIS
PHONE #: 800-635-0100 DEALER

CONTACT: _____

EMERGENCY PHONE #: _____

SHIPPING ADDRESS: _____
_____
_____

CARRIER: _____

ROUTING: _____

NOTE: The following section must be filled in to insure proper mail/phone referrals.

ZIP CODE REFERRAL AREA: _____

ZIP CODE REFERRAL CHANGES CAUSED BY THIS APPT/DELETION:

None

Zip area	Dealer(s)
Zip area	Dealer(s)

(Exhibit 2b)

Distribution List

BRANCH LOCATION(s):

Research	Dealer Sales	
Paula Petrucci	Penelope Graham	None
Pam Mills	Stephen Reid	
Dale Benson	Dave Johnson	
Ann Callear	Craig Wiggett	
Maryanne Puerner	Donny Bettis	
Corres.	Greg Flint	
Neil Fox	Jim Cunliffe	
Warranty	Holly Herwig	
CRIMP	Wayne Staples	

(Part of Exhibit 28a)

VERMONT CASTINGS

There's A Vermont Castings Representative Near You

At Vermont Castings we have always taken great pride in our reputation for customer service. Our choice of regional representatives has been made with a conscious effort to continue this tradition, and each dealer we select must be fully committed to a high level of service, both before and after the sale.

The result is a network of dealers in whom you can have the greatest confidence. Our dealers are experts in the field of wood and coal heating. They have been factory-trained in all aspects of Vermont Castings stoves.

Below are the Vermont Castings Authorized Dealers in your region. They can answer all your questions about heating with wood or coal, and will be glad to help you choose the Vermont Castings stove that's best for your heating needs.

ILLINOIS

Millhouse Centre
402 North Race
Urbana, IL 61801
(217) 344-7498

Resource Alternatives
Old Galena Road
Mossville, IL 61552
(309) 579-2435

Buss Energy Systems
RR 1
Golden, IL 62339
(217) 696-2763

Buss Energy Systems
1851 Broadway
Quincy, IL 62301
(217) 228-2359

(Part of Exhibit 28a)

Grass Roots Energy, Inc.
102 Park Street
Hampshire, IL 60140
(312) 683-2337

Grass Roots Energy, Inc.
Route 12,
1/2 mi. North of Rt. 176
Wauconda, IL 60084
(312) 526-5888

Alltypes Fireplace and Stove Co.
844 Madison Street
Oak Park, IL 60302
(312) 383-6007

The Aurora Fireplace Center, Inc.
232 South River Street
Aurora, IL 60506
(312) 892-8664

INDIANA

Bassemiers', Inc.
1409 First Avenue
Evansville, IN 47710
(812) 426-1962

Bassemiers', Inc.
4502 E. Morgan
Evansville, IN 47715
(812) 479-6338

MINNESOTA

Energy Plus
3000 Miller Trunk Hwy.
Duluth, MN 55811
(218) 729-6086

Energy Products & Design
119 4th Street S.E.
Rochester, MN 55901
(507) 289-7496

Energy Updaters
109 Washington St.
Brainerd, MN 56401
(218) 829-3817

Woodland Way
1027 Washington Avenue S.
Minneapolis, MN 55415
(612) 338-6606

Fireside Corner
833 Front Street
St. Paul, MN 55103
(612) 488-6613

Fireside Corner
2481 East County Road "E"
White Bear, MN 55110
(612) 770-3433

(Part of Exhibit 28a)

MISSOURI

Rockwood Stoves
158 West Argonne
St. Louis, MO 63122
(314) 821-4868

WISCONSIN

Energy Unlimited
1821 East Mason Street
Green Bay, WI 54302
(414) 465-1001

The Stove Works
715 2nd Avenue S.W.
Onalaska, WI 54650
(608) 783-2172

Eder-The Garden of Eder
5300 Highway K
Franksville, WI 53126
(414) 835-1000

Eder-The Garden of Eder
4917 West Fond du Lac Avenue
Milwaukee, WI 53216
(414) 445-6924

Eder-The Garden of Eder
N8 West 24040 Bluemound Rd.
Waukesha, WI 53186
(414) 547-3429

Sugar River Stove Works
Route 1, on Hwy. 59
506 North Mechanic
Albany, WI 53502
(608) 862-3866

The Wood Shed Stove Works
1402 West Court Street
Janesville, WI 53545
(608) 754-5878

(Part of Exhibit 15g)

THE WOOD SHED STOVE WORKS
(608) 754-5878

5/16/85

Steve:

For 18 weeks in a row we have had this ad in our local paper. The prices are great if you are going out of business.

I don't expect that you can do anything, but Vermont Castings (the Great White Father of wood stoves) created the situation. Yes I know I should be humble & least of all cynical, but lets take an historical look. Greg was appointed & then The Wood Shed. We were to market Rockford which we did & Greg Madison. Then the gray areas - promises. We were cajoled into believing that V.C. would take care of Greg & that they needed us to market the Madison area. We got stuck between V.C. & Greg Isaackson (sic) & his Rath (sic). The ad enclosed is from the Janesville store. In the 83-84 season we sold 140+ units (V.C.) in the 84-85 season with two stores & a much bigger ad budget we sold 85 VC's. Your ability to diffuse me is wonderful, but I can't take it any more. Please help us resolve the issue. And we will truly be appreciative.

Thanx

/s/ Tom

P.S. The ad is a result of V.C. actions & wouldn't be their (sic) if I wasn't appointed a dealer in Madison.

NO. 87-610
IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Petitioner,
v.
VERMONT CASTINGS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 87-610
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Vermont Castings, Inc.,[1] respectfully requests that this Court deny the petition for writ of certiorari of petitioner Greggar S. Isaksen, d/b/a Applewood Stove Works ("Isaksen"), seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 825 F.2d 1158.

[1]Pursuant to Rule 28.1 of the Supreme Court Rules, Vermont Castings, Inc. represents that it has no parent company, subsidiaries or affiliates.

STATEMENT OF THE CASE

The factual background of this case is set forth in petitioner's statement of facts. To the extent that reference to additional facts is necessary, they will be included in the body of the brief, with references to the volume and page of the trial transcript.

REASONS WHY THE PETITION SHOULD BE DENIED

I. NO REASON EXISTS FOR THE COURT TO OVERRULE *MONSANTO*.

The first Question Presented in the Petition is "whether the court should clearly reaffirm *Dr. Miles* [*Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)] in its full breadth." (p. i.) What petitioner means by such "reaffirmation" is the Court overruling *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). No reason exists for the Court to take such drastic action.

In *Dr. Miles*, the Court ruled that resale price maintenance agreements are per se unlawful under section one of the Sherman Act, 15 U.S.C. § 1. In *Monsanto*, the Court identified the evidentiary standards applicable to resale price maintenance agreements. In particular, the Court recognized that a manufacturer that depends upon its dealers for pre-sale services has a legitimate interest in its dealers' retail price, since the dealer's gross profit margin determines the level of pre-sale services it can provide. 415 U.S. at 762-63. The Court also recognized that it is inevitable under such a system that a manufacturer will receive complaints about discounting dealers from other dealers, and that, wholly apart from the complaints, the manufacturer may have its own reasons for terminating or otherwise taking action against its discounting dealers. *Id.* Accordingly, the Court ruled that a plaintiff dealer in a resale price maintenance case must do more that show that the manufacturer took the challenged actions after receiving complaints about the plaintiff's prices from other dealers or

distributors. "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 764.

This case represents a straightforward application of the evidentiary rules established in *Monsanto.* Petitioner Isaksen is a Vermont Castings dealer who has generally followed a discount pricing strategy. This has generated a number of complaints from other dealers. While Isaksen has not been terminated, he argues that his business has been injured by actions the company has taken against him. He claims these actions were taken as a means of punishing him for his pricing independence, in furtherance of a price fixing scheme between Vermont Castings and its other dealers.

However, as both the district court and the court of appeals found, Isaksen presented no evidence that tended to exclude the possibility that Vermont Castings was acting independently when it acted or failed to act in the manner challenged by Isaksen. What the complaining dealers wanted the company to do was either to force Isaksen to stop his discounting or else terminate him. The company did neither. Nobody requested that the company, for example, omit Isaksen from general lists of Vermont Castings dealers, or fail to refer customer leads to him, or give out the wrong phone number for him, which numbered among Isaksen's complaints. None of these actions had the effect of stopping Isaksen's discounting efforts. Indeed, Isaksen's response to what he perceived as his mistreatment by the company was to slash his prices still further. There is no credible evidence tying the company's actions to any price-fixing agreement with its other dealers, as both lower courts found.

As this discussion illustrates, Isaksen's petition essentially raises questions of evidence and factual findings that do not merit this Court's review under the current state of the law. Perhaps recognizing this, Isaksen argues that the current state of the law is wrong. He asserts that the law the Seventh Circuit applied to this claim is inconsistent with *Dr. Miles* and the will of Congress and in fact constitutes impermissible judicial legislation.

This argument has a number of shortcomings. First, it is un-

convincing to argue that the court of appeals has improperly attempted to exercise legislative power. All the court did was apply *Monsanto*. More fundamentally, at least since this Court announced the rule of reason in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the development of antitrust law has resulted in major part from evolving judicial construction of the sweeping language of section one of the Sherman Act. Indeed, Isaksen's argument here is that the court of appeals did not properly follow this Court's decisions in *Dr. Miles* and its progeny, not that it ignored a statute setting forth the evidentiary standards applicable to resale price maintenance claims.

Second, Isaksen argues that this Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919) was an "aberration" and a "mistake." (Pet. 21.) He contends that a narrow construction should be given to the *Colgate* doctrine, which holds that a manufacturer may lawfully announce that it will sell only to dealers who charge recommended retail prices and will terminate those who do not. But the Court did not narrowly construe the *Colgate* doctrine in *Monsanto*. Instead, the Court relied on *Colgate* in emphasizing the need for a plaintiff to discharge his burden of proving that challenged conduct was the result of joint rather than unilateral action. 465 U.S. at 761.

Isaksen contends that *Monsanto* and, by implication, *Colgate*, are distinguishable from this case because *Monsanto* concerned a "conspiracy" and this case concerns a "combination." (Pet. 21.)

This attempted resort to semantics to evade the precedential force of *Monsanto* is unpersuasive. As Professor Areeda explains:

> When there is sufficient concert of action to implicate the purposes of the Sherman Act, the statute is applied without any need or attempt to classify that concerted action as a contract or a combination or a conspiracy. This is the consistent course of the decisions, and it seems clearly correct. "We perceive no distinction between the terms combination and conspiracy. . . ."

VI P. Areeda, *Antitrust Law* ¶ 1403 at 17 (1986), quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

Third, Isaksen seems to assert that the court of appeals erred in judging this case by standards applicable to vertical arrangements (those between firms at different levels of the chain of distribution), rather than by the more stringent standards applicable to horizontal arrangements (those between firms at the same level of distribution). Isaksen asserts that the jury was entitled to draw the type of inferences from the evidence that the Court has endorsed in the horizontal context. Isaksen cites, for example, *United States v. Container Corp. of America*, 393 U.S. 333 (1969) and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), both of which deal with communication about prices among direct competitors.

The court of appeals correctly characterized this as a vertical case. Vermont Castings manufactures wood burning stoves and sells them to Isaksen, who resells them at the retail level. Vermont Castings has also sold its stoves directly to end users through mail order sales and a retail outlet at its headquarters in Vermont,[2] but the company's dual distribution does not transform this into a horizontal case involving direct competitors. See *Dart Industries, Inc. v. Plunkett Co. of Oklahoma*, 704 F.2d 496, 498-99 (10th Cir. 1983); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1355-57 (9th Cir. 1982); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1201-02 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); *Copy Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405, 409 (2d Cir. 1981); and *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 425 (5th Cir. 1981). Indeed, there was evidence in *Monsanto* that Monsanto operated company-owned outlets. 465 U.S. at 766. By Isaksen's reasoning, this would transform Monsanto into a direct competitor of Spray-Rite and make

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[2]From its founding in 1975, Vermont Castings gradually moved from a company relying on direct sales to one relying on sales through dealers. In 1986, the company announced it was withdrawing from the direct sales business entirely. (Tr. 1A, p. 70; 3A, p. 74.)

the case a horizontal one. This of course was not the method of analysis this Court followed.

Finally, Isaksen emphasizes Vermont Castings' appointment of a rival to open a dealership in Madison, 22 miles from his outlet, as evidence of the steps the company took to harm him. (Pet. 11) What Isaksen overlooks is that, whatever its motivation, this appointment could not give rise to an antitrust injury, for it increased competition rather than diminished it. As in *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Cargill, Inc. v. Monfort*, 107 S. Ct. 484 (1986), the claim here is for damages measured by the profits the plaintiff would have realized had competition been reduced. Such a claim misapprehends the purpose of the antitrust laws and is not entitled to judicial recognition.

The first two Questions Presented in Isaksen's petition take different routes toward the conclusion that, on the state of the evidence, the jury was entitled to infer an illegal price-fixing agreement between Vermont Castings and its other dealers. No matter how they are phrased however, Isaksen's arguments run headlong into this Court's holding in *Monsanto*. The grounds Isaksen advances for distinguishing *Monsanto* are clearly unpersuasive, and he relies principally on his own displeasure with the continued adherence to the *Colgate* doctrine expressed in *Monsanto* as a basis for reconsidering the issue now. Stripped of its rhetoric, this case turns on evidentiary questions and raises no unsettled issue of general importance to the administration of the antitrust laws. The petition should be denied.

II. NO REASON EXISTS FOR THE GRANT OF CERTIORARI TO REVIEW RULINGS ON THE ADEQUACY OF THE DAMAGES EVIDENCE.

The third Question Presented asks what additional proof Isaksen should have introduced in order that the damage verdict could be sustained. Both the district court and court of appeals answered this question. No reason exists for this Court to sift through the evidence and reach the same conclusion again.

Isaksen's damage theory was simple. He averaged what he considered to be his profits for the years 1977 to 1982 and compared the figure to what he considered to be his average profits for the years 1983 through 1986. (He was appointed a Vermont Castings dealer in 1982). The difference in the two average profit figures was what he considered his average yearly damages for the damage period.

These calculations formed the beginning and end of his analysis. Isaksen never took into account the substantial downturn in the wood stove industry that began in 1979 and continued through the time of trial. Isaksen's sales in 1985 represented a 58% decline from 1982. (Tr. 4B, p. 9.) There were three other significant Vermont Castings dealers in Wisconsin who were in business throughout this period. Again comparing 1985 with 1982, their sales declined about 60%, 60% and 70%, respectively. (Tr. 4B, pp. 8-9.) Isaksen's analysis failed to take into account this downward sales trend which establishes that the periods he attempted to compare were not in fact comparable.

Isaksen's damage theory also failed to take into account the effect of lawful competition, such as the establishment of a Vermont Castings dealer in Madison in 1984, and failed to provide the jury with a basis by which it could distinguish between harm caused by illegal acts it found and harm caused by anything else.

After surveying these deficiencies, the district court stated that if it were not ordering judgment notwithstanding verdict, "defendant would be entitled to a new trial on damages as the damage verdict was clearly excessive." (Pet. 22a.) Noting that "*post hoc ergo propter hoc* is not a valid method of damage calculation," the court of appeals agreed that the damages awarded were grossly excessive and required a new trial. (Pet. 9a.)

Isaksen disagrees with these rulings, but he offers no reason to conclude that the damages issue raises anything other than factual and evidentiary questions of interest only to the parties in this case. Of course, he also fails to show that both lower courts were wrong.

Isaksen raises the further argument that if a new trial on damages was to be awarded, he was entitled to the opportunity to accept a remittitur and forego the new trial. This argument does not raise a substantial federal question. A remittitur is not a matter of right; it is an optional remedy that can be offered in the exercise of a court's discretion. It is not an abuse of discretion to decline to offer a remittitur, and the failure to do so is not an appealable issue. *See* 11 Wright and Miller, *Federal Practice and Procedure* § 2820 (1973).

Further, there was no basis for a remittitur in this case. Isaksen's all-or-nothing damage theory lacked a proper foundation. Once that approach is dismissed, there was no basis offered for tying any specific damage amount to any of the illegal acts Isaksen claimed. The court could not specify a remittitur amount without resorting to the same sort of groundless speculation that was required for the jury's damage award. Thus, even if Isaksen had some right to a remittitur in appropriate circumstances, the same evidentiary deficiencies that doomed the damage verdict also foreclosed the district court and court of appeals from offering that option here.

III. THE FOURTH QUESTION PRESENTED RAISES A MOOT ISSUE THAT DOES NOT IMPLICATE DUE PROCESS RIGHTS IN ANY EVENT.

The fourth and final Question Presented asks whether Isaksen was denied due process by the court of appeals' ruling that the district court should consider on remand Vermont Castings' Rule 59 motion for a new trial on liability. This argument is specious. Isaksen has been deprived of no right. He was entitled to raise whatever argument he wished in opposition to the motion for a new trial when the matter was first presented to the district court; he will be able to present whatever argument he wishes when the district court considers the motion on remand; and if he is still dissatisfied after the proceedings on remand, he may take another appeal.

Isaksen does not raise a substantial issue of federal law. As he

admits in his petition, his argument is only that the Seventh Circuit did not follow its own rule here, and that other circuits have other rules. (Pet. 27-28.)

Finally, the issue raised by the fourth Question Presented is moot. Isaksen claims that the district court should not be permitted to consider on remand the grounds that have previously been asserted for a new trial on liability. But, given the posture of the case following the court of appeals' decision, a new trial on liability is compelled. Isaksen pressed two theories of antitrust liability at trial. One was that Vermont Castings injured Isaksen in furtherance of a price-fixing conspiracy with its other dealers and the other was that Isaksen was an unwilling co-conspirator with Vermont Castings in a price-fixing scheme. The court of appeals ruled that judgment notwithstanding the verdict was appropriate on the first claim but not on the second. However, the jury returned what amounted to a general verdict. (Pet. 24a.) There is no way to tell which of Isaksen's theories the jury accepted. Under these circumstances,a new trial on liability is required. *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 29-30 (1962); *United Pilots Assn. v. Halecki*, 358 U.S. 613, 619 (1959). Thus the district court need not reach the other arguments that have been asserted as grounds for a new trial, and it is the consideration of these arguments to which Isaksen objects.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Vermont Castings, Inc.

November 12, 1987